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Sexual Harassment in Public Schools: *Speeches* from the 2000 HWLJ Symposium

The Hastings Women's Law Journal Symposium, "The Academic Epidemic: Peer Sexual Harassment After Davis v. Monroe County Board of Education," was held at Hastings College of the Law on March 3, 2000. Following are the Symposium speeches given by two of the panelists. Hastings Women's Law Journal staff edited for clarity, researched and added footnotes to the text of the speeches. The Journal wishes to thank Christine L. DeSimone for her editorial work.

SEXUAL HARASSMENT MEETS ZERO TOLERANCE: LIFE IN K-12 SCHOOLS SINCE DAVIS

*Dr. Nan Stein, Moderator**

I want to talk about the larger context that I see the *Davis*¹ case has landed into, which is that of zero tolerance, law and order and a certain notion of school safety that really pervades the country. I believe that the victory in the *Davis* case has been appropriated by people who we may not want to consider our allies—the zero tolerance and the “law and order” crowd. I believe that the *Davis* case is being used for purposes that I, for one, do not agree with. If we are not careful, we, the feminists, will begin to look like we endorse these purposes. I, for one, plan to make a lot of noise about this, and I am here today to find out how you all feel.

First, I want to go back a bit into the last decades of the twentieth century as the term “sexual harassment” came flying into the national discourse, no longer only residing in the realm of workplace discrimination or the vocabulary of feminist legal scholars, law students and some school officials. Now the term “sexual harassment” is everywhere, even in places

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1. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

we may not want it to be applied, and sometimes we might privately cringe when we hear it used. Events that we may consider trivial have been labeled sexual harassment, maybe deliberately, in an effort to make us look like we have gone too far. Not only do we get labeled “anti-boys,” but somehow we are considered just downright silly. But quite frankly, that is not what disturbs me as much as the hijacking of the legal victory in the *Davis* case, which I think now is being used in the service of surveillance and control amid the law and order and school safety discourse that consumes the nation.

The wonderful victory in the *Davis* case is no longer ours and no longer simply feminist. The feminist discourse and the thinking that began this work on sexual harassment years ago, which led to the Supreme Court victory, has been appropriated by the zero tolerance crowd, and has added sexual harassment to the long list of behaviors that gets kids suspended and expelled from school. There are no second chances for kids, no discretion for administrators and no teachable moments for teachers to use with their students. I am a former middle school social studies teacher, and I had thirty-six kids in my class. And I had to use and believe in the teachable moments. But that technique has been removed from a teacher's repertoire, and is now justified under the rubric of zero tolerance.

Moreover, remembering the context into which the *Davis* case has landed helps to explain the predicament that we are now in. The *Davis* case was decided on May 24, 1999, one month after the shootings at Columbine High School.² The *Davis* case, I believe, was rapidly converted into another justification for law and order, anything to avoid a lawsuit or a school shooting. We can't forget that the school safety mania and the zero tolerance mantra is part of a larger picture and a larger discourse that also includes trying kids as minors and, in this state, manifests Proposition 21 currently on the ballot.³ I just learned about this as I arrived in California the other day. There is an incredible flood across the country of efforts to try kids and minors as adults, as well as deterrence theories, mandatory sentencing, three strikes, drug policy, capital punishment and the reduction of civil liberties. Our feminist victory is being used by people we may not consider our allies and who would be hard pressed to care about feminist issues. Feminism is being used to establish forms of control.

However, I promise that my talk is not going to be depressing or one of defeat because I am neither a defeatist nor am I depressed, and I am not someone who sees conspiracies everywhere. Rather, I want to raise my concerns today at this conference as a place to talk, today and beyond,

2. School shootings, including the one at Columbine, will be discussed in more detail in Christine Hwang's speech.

3. California Proposition 21, also known as the “Juvenile Crime Initiative,” allows all minors fourteen or older to be tried as adults for serious offenses. It was passed shortly after this speech.

about what we need to do, where we want to go and with whom we want to ally. There will be costs if we don't think these issues out thoroughly. I will talk a bit, as I said, and then leave time for discussion.

I want to go back now to 1992 when I conducted a survey on sexual harassment in schools in *Seventeen Magazine*.⁴ There were two open-ended questions asked, one of which was, "What do you think schools should do about sexual harassment?" One young respondent wrote, and one of my Wellesley students blew it up for me in the kid's handwriting, "I believe that if all girls who have ever been sexually harassed reported the guys who did it, there would no longer be any boys in school." And at the time I thought "Well, this is true but not likely." When boys sexually harassed girls, if it got noticed at all by school personnel, it was treated very lightly.

Now fast forward to the fall of 1996, when the nation focused on the incident in Lexington, North Carolina, when Jonathan Prevette, that little cute six-year-old boy with the curly hair and the thick glasses kissed a little six-year-old girl.⁵ Remember all of the media attention that was focused on this incident, the injustice of his so-called suspension? He wasn't suspended, he was simply moved from one classroom to another. I mean, by no definition of "suspension" is this a suspension, but nonetheless, he was "removed from his classroom." Remember all the bashing that school officials got for paying attention to the plight or distress of this little girl? They were made to look the fool for extending this label of sexual harassment to a little kid. But the real culprits were made out to be the feminists who had gone too far. We were blamed for having created a world where Jonathan is now being demonized.

Just last week I reviewed the tape from *Nightline*, the episode with Ted Koppel that aired on October 4, 1996, which focused on this "kissing kid" episode.⁶ His guests were Verna Williams of the National Women's Law Center in Washington, D.C., the woman who argued the *Davis* case in the Supreme Court; Peggy Orenstein, a Bay Area journalist and author of *School Girls*; Dr. Alvin Poussaint, a child psychiatrist at Harvard Medical School; and Christina Hoff Summers, former philosophy professor at Clark University, author of *Who Stole Feminism?* and a scholar at the American Enterprise Institute, a conservative think tank in Washington, D.C. What struck me when I watched the episode of *Nightline* was the lack of a discussion framed by zero tolerance or school safety. Those terms were nowhere to be found in that half-hour episode of *Nightline*. So, in four years we have this whole new discourse going on. We have the "kissing

4. A. LeBlanc, *Harassment in the Halls*, SEVENTEEN, Sept. 1992, at 162-70.

5. Prevette was excluded from classroom coloring and playing activities, as well as from an ice-cream party, as punishment. See *First-Grader Banished for Kissing Girl on Cheek*, THE DETROIT NEWS, Sept. 25, 1996, at A5.

6. *Nightline with Ted Koppel* (ABC television broadcast, Oct. 4, 1996).

kid" episode and we have six-year-olds, unfortunately, shooting each other,⁷ but we focus on the discourse of kissing, and nowhere to be found, nobody brought it up, is the notion of school safety or zero tolerance.

It was right around that time, in 1996, that schools were required to pass zero tolerance policies. They became a requirement to bolster school safety and ensure orderly learning environments. The Gun Free Schools Act, passed by Congress in 1994, requires states that receive federal funds to mandate expulsion from school for at least one year for any student who brings a weapon to school.⁸ These expulsion policies have extended from guns to now include toy weapons, drugs and symbolic representation of drugs. There is a case that the Massachusetts ACLU reported in which a boy drew a marijuana leaf and that was now considered a violation of the school drug policy.⁹ Now, this kid could have lied and said it was a tomato plant, right? But he was honest and he said it was a marijuana leaf and he got expelled. So the litany now of what gets included in zero tolerance is not just real weapons or real drugs but symbolic representations of drugs, a drawing of a marijuana leaf. It also includes fighting, gang activity, threats of violence, hate offenses and sexual harassment.

More and more children are being removed from school with no place to go. There is no requirement to establish alternative schools for these kids. More and more kids are hitting the street, becoming exiled and becoming criminalized, if you will. I believe this is also a manifestation of the decline of our sense of collective responsibility. In October of 1998, the White House held a conference on school safety, essentially to address the school shootings that had taken place the previous spring in Jonesboro, Arkansas and Springfield, Oregon.¹⁰ Three factors were promoted at this conference as a way to create school safety: school uniforms, metal detectors and curfews. In this post-Columbine world, since this conference was held before Columbine, schools now think that the way to ensure school safety is to ban trenchcoats, to remove lockers from the hallways and to only permit students to carry see-through backpacks. In addition, students have been suspended retroactively for papers they have written, thoughts they have had and in one case, as I said, for a marijuana leaf drawing, which was seen as a violation of the school's zero tolerance

7. In February 2000, a six-year-old boy in Michigan shot and killed a six-year-old classmate in the presence of his teacher and other children. See Peter Slevin and William Claiborne, *1st-Grader Shoots Classmate to Death*, WASHINGTON POST, Mar. 1, 2000, at A1.

8. See 20 U.S.C. § 8921(b)(1) (2000).

9. See *Post-Columbine School Hysteria Continues* (last modified Oct. 12, 2000) <<http://www.aclu-mass.org/youth/studentrights/postcolumbine.html>>.

10. The "1998 White House Conference on School Safety: Causes and Prevention of Youth Violence" was held on October 15, 1998, and focused on initiatives to help schools hire and train new officers and develop antiviolence and antidrug plans. See *The First Annual Report on School Safety* (Dep'ts Justice and Educ. 1998) <<http://www.ed.gov/PressReleases/10-1998/wh-1014.html>>.

policy on drugs.

Moreover, zero tolerance policies have racial implications; students are being suspended disproportionately according to race under zero tolerance policies. According to the U.S. Department of Education, figures in the 1997 school year show the following distribution: black children made up seventeen percent of all U.S. students but thirty-two percent of those suspended; white students made up sixty-three percent of all students and fifty-one percent of those suspended; Hispanics made up fourteen percent of all students and represented thirteen and a half percent of those suspended.¹¹ There is a new study that just came out this week that looked at ten U.S. cities and their suspension statistics, and the proportion for African-American kids is still about the same.¹²

Now, onto some examples of sexual harassment that I have come upon, gathered from the media, from parents who call me, kids who e-mail me and from the many conversations that I have with teachers and administrators. My examples are not scientific, but as I always say, neither are lawsuits. They are a sample size of one, but they can teach us a lot, and they may be signs of where the nation might be headed. The examples that I read to you might be at the margins of what is happening, but they allow us to think about whether we would want these examples to become the center or the norm. Listen to what is going on in schools since the *Davis* case.

An elementary school boy in Washington State sticks out his tongue at a girl and he gets suspended; this got construed as sexual harassment. When I think about how often students stick out their tongue at the quality of the food, I get really worried about just how sticking out a tongue is now construed as sexual harassment. This is not a teenage boy making gross tongue movements at a girl; this is a little kid.

Five fourth-graders in New York were suspended for poking straws through a milk carton with a photo of cheerleader on it.¹³ They poked through part of the represented body that was her chest. This got construed as sexual harassment. I wonder what would have happened if these kids poked their straws at what would have been the head, would they be treated like Columbine shooters? What if they stuck them through her foot, would that be voodoo or acupuncture? Who knows. This is getting very troubling. I don't understand how this gets construed as sexual harassment.

A mother in Colorado, who has two twin fifth graders (one boy and one

11. See P. Shepard, *Disparity By Race in School Discipline*, BOSTON GLOBE, Feb. 19, 2000, at 3.

12. See RUSSELL J. SKIBA ET AL., THE COLOR OF DISCIPLINE: SOURCES OF RACIAL AND GENDER DISPROPORTIONALITY IN SCHOOL PUNISHMENT 2-4 (June 2000) (Policy Research Report #SRS1 by Indiana Education Policy Center, Bloomington, IN).

13. See Candice Furlan, *Fourth Grade Harassment Alleged*, EDUC. WK., Feb. 23, 2000, at 4.

girl), called to tell me that her son had been labeled as a sexual predator for “depants-ing” another boy his same age on the school playground. His school’s principal did not think that it was sufficient to suspend him or have him lose his recess privileges and offer an apology to the other child; now he is being teased as being a sexual predator.

I had an e-mail that came to me from a teenage boy, and I want to read it to you. It’s very interesting, by the way, how teenagers do research on the web. I get a lot of e-mails from teenagers researching papers on sexual harassment; they type in a search for “sexual harassment in schools” and my name and Wellesley’s name comes up. They send an e-mail through Wellesley’s webmaster. [The e-mail read:]

My name is [name deleted]. I am a seventeen-year-old senior in high school. I found out today that I was accused of sexual harassment. I was amazed and taken by surprise because I had no idea that what I had done was considered as sexual harassment. This was possibly because my school had not properly educated the student body about the fact of sexual harassment or possibly because I am an ignorant person. About a month ago, I commented [sic] a fellow student about her figure in a positive manner. That person gave little response, so I continued the compliments about three other times, and still received no response. Agitated by this reaction, I soon disliked the person. I began to annoy her every so often. Please keep in mind this is over a month or so, maybe twice a week. I would ask stupid questions of this person. Like, “Do you hate me or not?” And I sometimes would poke her arm with my index finger in a way that would render no danger physically. I would maybe once in a while walk by her desk and graze her arm. Once I made a remark that if she didn’t respond to the question, that meant she wanted to go on a date with me and become more than friends.

This guy’s repertoire is a little stunted. Nonetheless, to me, he was bugging her too. The salient point is that he said the school hadn’t offered any training in sexual harassment.

Continuing with the letter:

Due to the fact that this person rarely gave any response, I didn’t notice effects of agitation. So, today I find out that it’s sexual harassment. I did research on the Net and found one common reoccurrence—it stated that sex harassment must have an obvious and profound effect on the work performance of the victim, so much so that the task begins to become very difficult to do. I took this as the student’s learning environment becoming drastically affected so that they weren’t able to learn. Do you have any suggestions or an answer whether I am guilty or not? I have a

conference Monday on this matter, so if there is any way that there is any way [sic] you can reply to this by then, it would be most graciously accepted.

I wrote him back, but by then it was after Monday morning. To me the point of the story is that this is a kid trying to reach out, trying to obtain an explanation that his school isn't giving him. Likewise, I get reports from teachers regarding how they are being designated, quite out of the blue, by school administrators to now become the sexual harassment grievance coordinators for the school without any preparation. I heard from a third grade teacher in Massachusetts, how she was supposed to provide training for the rest of the staff and was very clueless and worried. The administrators seem to be appointing teachers without any guidance or opportunity to get training for themselves, just an order to do it.

Now, to return to my larger points and concerns of zero tolerance policies, I believe that they are antithetical to feminism—that they represent an individualistic approach. There is no collective piece to them. They exclude rather than try to reshape or reform the individual. There is no collective responsibility for the excluded person, no space for them. In addition, zero tolerance policies, besides sacrificing the individual in the name of creating this supposed “safe middle,” seem, to me, to be the opposite of the whole notion of education, which is usually about trying to help students learn and improve—whether it is their reading, grades, curiosity or goals. Generally schools don't abandon kids when they have trouble reading or writing, or at least won't publicly admit to it and brag that they are abandoning anyone who can't read at the grade level. There are always efforts to accommodate kids' various learning styles and rates. I think we need to employ several simultaneous strategies to make schools gender-safe places, and to ensure that sexual harassment won't have a presence. I would like to suggest that we call this “zero indifference,” that we notice sexual harassment, that we are not indifferent to it, but that we are not throwing people out. I have been trying to come up with a word. I prefer the word zero “ignore-ance,” but it doesn't happen to be a word. Right? Because that is like zero ignorance and that's not what I mean. So instead, I mean “zero indifference.” So, if anyone has a better substitute word, let me know.

Here are what the six elements of “zero indifference” would be. We need, first of all, a place for lessons and curriculum, engaging and fun, not lectures by school board attorneys in the auditorium. I am sorry for school board attorneys who are in the room—they are usually not fun. And these lessons need to be age appropriate. The more the subject of sexual harassment—and I also like to connect it to gender violence—can be integrated into the whole curriculum and into the main text that students are using, the better.

Secondly, all the staff needs to be trained. That includes all

administrators, as well as custodians, school secretaries, bus drivers, coaches, teachers, guidance counselors and school psychologists—I mean everybody has to be a part of the training. The training has to last longer than a staff meeting or the two and a half hours on early release day. Like, how about a full day? Or how about repeated sessions throughout the year?

Third, once that large group has been trained, one man and one woman from every building needs to be designated, as I like to call them, the “ombuds.” I hate the expression of “sexual harassment grievance coordinators” or “sexual harassment complaint manager.” What kid is going to show up to someone’s office who has that title? With “ombuds,” at least we’re teaching them another language. These are people that kids can go to, and please don’t put it in the central office building, kids can never find that building, and it’s too intimidating for them to go there. So, these are the people that kids can go to to talk about concerns and inquires and know that they will act on their behalf.

Fourth, there needs to be multiple strategies for resolution, which may involve a face-to-face meeting between the protagonists—as long as the meetings are voluntary and adults are present in the room. I do not believe that it is up to the kids to solve the problem of sexual harassment. This is why I am basically against peer mediation—when there is no grown-up in the room, just a forced mediation conducted only by student mediators. I have seen schools where mediation is required and forced upon them. These voluntary efforts may also include a strategy such as writing a letter to the harasser. But none of these voluntary efforts should ever take the place of punishment, especially when the incident involves physical contact—which was certainly the case of LaShonda Davis in her lawsuit¹⁴—and if it was a repeated event that involved physical contact.

Fifth, there needs to be compassionate responses offered to the harasser in the form of counseling, whether it is individual counseling or group counseling. I am working with a high school in the Boston area through a National Institute for Justice grant. It’s called a COPS Grant. This high school offers many counseling groups to both high school boys and girls. The boys tend to be ones who have harassed girls, and the counseling is run by a guy that they like. The girls typically join because they want to talk about the abusive relationships that they find themselves repeatedly entering into. Other schools offer counseling groups throughout the whole school year. I am inspired by a group in Austin, Texas. It’s a combined domestic violence and sexual assault agency called “Safe Place,” which has been running groups in the Austin schools for about twelve years. They reach hundreds of kids every year in the twenty-four week session, so it is

14. The fifth-grade plaintiff in *Davis* reported that a classmate attempted to touch her breasts and genital area and rubbed his body against her in a sexually suggestive manner. See *Davis*, 526 U.S. at 633-34.